Defense counsel's opening statement became flawed once Moeck decided not to testify. This flaw had to be remedied. The remedy was complicated by legitimate Fifth Amendment concerns because the prosecutor could not directly or indirectly comment on Moeck's refusal to testify. The fundamental issue raised by this case is who decides upon the appropriate remedy. This Court in *Arizona v. Washington* placed that judgment call squarely in the hands of this nation's trial judges because they are in the best position to evaluate the impact of the defense error on the State's right to a fair trial by an impartial jury. *Arizona v. Washington*, 434 U.S. at 513-14. The Wisconsin Supreme Court and a number of other lower courts do not trust trial judges to make that difficult judgment call.

4. While insisting that his attorney was blameless and acting in good faith, Moeck ascribes sinister motives to the prosecutor here. Moeck believes that the prosecutor wanted to abort the trial because she knew the State's case was going badly. Br. in Opp. at 29-32. Whether or not that self-serving characterization of the trial is correct (and it is not) is beside the point. Neither the trial court, the Wisconsin Court of Appeals, nor the Wisconsin Supreme Court found that the prosecutor was motivated by anything other than a sincere desire to protect the State's right to a fair trial by an unbiased jury. If Moeck believes the case was "going badly" for the State, it was due largely to counsel's improper opening statement putting Moeck's unsworn and uncross-examined testimony before the jury. It was reasonable for the trial judge to abort this trial not because the State might lose, but because it might lose unfairly and without recourse.[3]

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[3] Moeck's reference to an alleged post-trial hearsay statement by an investigating officer, Br. in Opp. at 11, 30-31, was never proven by him and is vehemently denied by the State. It is entitled to no weight.

Moeck's theories about the prosecutor's motives have no bearing on whether the Wisconsin Supreme Court abided by this Court's decision in *Arizona v. Washington* (it did not), and on whether the lower courts are divided over the meaning and application of that decision (they are).

CONCLUSION

This Court should grant certiorari and reverse the decision of the Wisconsin Supreme Court.

Respectfully submitted,

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